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Johnson & Fraser for P. C.

In the Supreme Court of the United States

OCTOBER TERM, 1899.

Filed Dec. 4, 1900.

No. ~~102~~ 21.

JOSEPHINE HOLT THROCKMORTON AND LUKE DEVLIN, PLAINTIFFS IN ERROR,

vs.

WASHINGTON D. HOLT ET AL., DEFENDANTS IN ERROR.

Reply Brief for Plaintiffs in Error.

J. J. DARLINGTON,
CALDERON CARLISLE,
WILLIAM G. JOHNSON,
GEORGE C. FRASER,
Counsel for Plaintiffs in Error.

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vs.

WASHINGTON D. HOLT ET AL., DEFENDANTS IN ERROR.

Reply Brief for Plaintiffs in Error.

It is not the purpose of this brief to reargue the case of the plaintiffs in error, nor to respond to the arguments of the counsel for the defendants in error, but certain strictures in their brief upon the brief for plaintiffs in error seem to justify, if not require, notice. Nor is it intended to notice all of these criticisms, but only some of the more important, which seem to counsel for the plaintiffs in error not only to be unjustified reflections upon their fairness, but possibly misleading to the court.

It is stated, without qualification, that neither of the principal questions discussed in the brief for plaintiffs in error arises in the case; that neither of the important questions which are really raised by the Record are discussed or even stated in the brief for plaintiffs in error, which is mainly devoted to questions not presented by the Record at all (Defendants' Brief, pp. 4 and 5).

This criticism is not only severe, but, if justified, most humiliating, in that it necessarily attributes to counsel either

lack of capacity to understand the case or a deliberate purpose to mislead the court.

It is best answered by reference to the opinion of the Court of Appeals in this case which placed a different estimate upon the discernment and fairness of counsel for the appellants there, for it says (Rec., p. 155):

> "*The contention of the appellants is supported by the citation of many cases denying the competency of such evidence,* especially the subsequent declarations of the testator, on that issue" [execution].

If counsel for plaintiffs in error misapprehended the questions in the case, so did the court below, whose judgment counsel for defendants in error are seeking to uphold.

It is also stated that at the trial and in the Court of Appeals no objection was made to the evidence introduced relating to the period prior to February 7, 1873, and some of the assignments of errors in the Court of Appeals are reprinted with the comment that it is now suggested in this court that there was error in the admission of such evidence (Defendants' Brief, pp. 7–9).

The inference from this is that the plaintiffs in error have assumed a new position in this court. A comparison of the assignments of errors in the Court of Appeals, as quoted, with those in this court (Nos. 6, 7 and 8) will show that they are *identical in substance* and nearly so in language, the only verbal changes being in the interest of brevity and (as is hoped) improved grammatical construction.

It is not claimed in this court that there was error in the admission of evidence as to matters prior to February 7, 1873. No such claim could be made, because that evidence was not objected to at the trial and is not covered by any exception.

In the judgment of counsel, however, such evidence is incompetent and its admission, if objected to, would have been error.

It is also charged that—

> "From the beginning to the end of the brief submitted in this court on behalf of the caveatees, it *seems* to be assumed that the trial court had ruled that declarations made by Judge Holt as to past facts were competent evidence to prove those facts," (Defendants' Brief, pp. 9–10).

And that—

> "They now shift their ground and claim *apparently* that the declarations were admitted not for the purpose of either showing directly his testamentary intentions or showing them indirectly by manifesting his feelings toward the persons concerned, but for the purpose of showing that his statements as to past transactions were true" (Defendants' Brief, pp. 27–28).

These statements are wholly unfounded. No such position is "assumed" nor have counsel anywhere attempted to "shift their ground." At the very outset of their discussion of the issue of forgery counsel for the plaintiffs in error state (Brief, p. 108; see also, pp. 110, 124 and 199) that the caveators introduced evidence of the acts and declarations of the testator tending to show, as they claimed, *his state of mind, feelings and intentions with respect to various persons.* During the whole discussion of forgery this is the class of evidence referred to, and it is clearly shown, and now repeated, that the contention of counsel is that evidence of the state of mind, feelings or intentions of the testator or his relations to his next of kin or the legatees is utterly irrelevant to the issue of execution *vel non.*

Counsel for defendants in error also conceive it to be their duty—

> "to correct some of the errors contained in that part of the brief for plaintiffs in error which is headed 'statement'" (Defendants' Brief, p. 17).

Six pages are devoted to these supposed delinquencies of their adversaries. It is unnecessary to notice all of them; examination of a few will suffice to show who has fairly stated the evidence, and the value of the "correctors'" corrections.

Exception is taken to the statement in the brief for plaintiffs in error (Brief, p. 5) that Judge Holt spent the last thirty-four years of his life alone, unattended by any relative, his household consisting merely of domestic servants. This is one of the "errors" which counsel for the defendants in error "wish to correct," and undertake so to do by the following observations (Defendants' Brief, p. 17):

> "The *fact* is that the testimony tended to show that *several* of his relatives, especially the members of Washington Holt's family, visited him frequently, *sometimes* staying six months *at a time*" (citing Rec., p. 69).

The plain inference from this "correction" is that more than one relative was an inmate of Judge Holt's house for six months on more than one occasion.

Certainly the phrase "several of his relatives" in this connection means more than one of them, and the phrase "*sometimes* staying six months *at a time*" means more than one visit of that duration. Yet "the fact is" the evidence referred to shows (Rec., p. 69) that only *one* person, not a relative, but the wife of a relative, was ill at his house on *one* occasion for five or six months.

The same evidence (Rec., p. 69) shows that a relative (Mary Holt) spent several months in Washington in 1893, but *at a boarding house.*

Furthermore, the Record will be searched in vain for a trace of evidence that any one of his relatives ever spent so much as *one* month at his house.

It is submitted that this "correction" serves only as confirmation of the statement sought to be corrected.

The next "correction" is of the statement in brief for plaintiffs in error (Brief, p. 5) that Joseph Holt espoused the Union Cause with zeal and bitterness, while his relatives allied themselves with the Confederacy.

The "correction" is made by saying (Defendants' Brief, p. 18):

> "The bill of exceptions states that the evidence tended to prove that during the war Joseph Holt *had not manifested any bitterness of feeling toward any of his relatives*" (citing Rec., p. 49),

and this statement is repeated in similar language (Defendants' Brief, pp. 24–25).

Opposed to this is the evidence on behalf of the defendants in error by two of themselves. Robert S. Holt says (Rec., p. 60):

> "Joseph Holt had become very much embittered toward the South and Southern people, growing out of the war, which *bitterness existed between him and some members of his family*," and—

(Rec., p. 61) that he felt—

> "somewhat resentful that the latter [Joseph Holt] had permitted the *bitterness growing out of the war* to so affect his relations to his family that he had apparently manifested no interest in the family of his brother."

And again (Rec., p. 64) that—

> "Witness did not know how Joseph Holt felt towards him and devoted little thought to the subject, only feeling that if indifference to the children of his brother could spring from *the bitterness and hostility engendered by the war* witness had no concessions or compromises to make."

Mrs. Bowmer, another of the defendants in error, says (Rec., p. 64):

> "Joseph Holt *never visited her father's house after the first year of the war*; that he did not revisit Kentucky

> until 1869 or 1870, when he stopped at the old homestead, with the family of Thomas Holt [the father of Washington Holt]; that at that visit *there were cold and strained relations between him and said family.*"

This "correction," like the former is a confirmation of the statement in the brief for plaintiffs in error. Surely, counsel for plaintiffs in error are justified in stating the facts as established by the uncontradicted evidence of the caveators themselves, given in their own behalf, and it is submitted that the counsel for defendants in error have no right to characterize such statement as an "error" or to attempt to "correct" it by ignoring their own evidence.

Exception is also taken to the fact that in the brief for plaintiffs in error (Brief., p. 10) it is stated that Devlin

> "frequently met Judge Holt socially at the house of Mrs. Throckmorton, Sr., [and] occasionally called on him."

Counsel for defendants in error assert that this statement is misleading to this court, the objection being that Devlin's testimony is the only evidence in support thereof, and that

> "all the other testimony on the subject showed that it was untrue" (citing Rec., pp. 43, 81), (Defendants' Brief, p. 18).

Examination of the Record pages referred to will show that the characterization of Devlin's testimony as untrue is wholly unjustified and unfounded. At page 43 Colonel Winthrop merely says that *at the office* he saw "no indication" of social relations between Devlin and Judge Holt, while at page 81 it is stated that the caveators gave evidence "*tending to prove*" that there never were at any time social relations between Devlin and Judge Holt. It is to be observed that nothing found in either of these references to the Record denies that Judge Holt visited Mrs. Throckmorton, Sr., or that Devlin frequently met him at

her home, nor that Devlin "occasionally called on him."

But even if the testimony for defendants in error had contradicted Devlin, it is submitted that it would not follow that his testimony was untrue.

Counsel for defendants in error take quite a different view of contradictions of their own witnesses. They assert as a fact (Defendants' Brief, p. 17) that—

> "during the last fourteen years of his [Judge Holt's] life neither Devlin nor any member of the Throckmorton family ever entered his door, except that on one or two occasions Miss Throckmorton obtruded herself upon him for a few moments" (citing Rec., pp. 82–84).

Pages 82 and 83 contain no reference to the visits of either Devlin or Miss Throckmorton.

The only reference in these three pages of the Record to Devlin is by Judge Holt's coachman who says (Rec., p. 84):

> "He *does not remember* taking Mr. Devlin's name to the testator nor hearing the testator speak of him; that he does not remember all the strangers who called."

The only reference to the visits of Miss Throckmorton is in the testimony of the colored servant, Martha Scott, also on page 84. That witness does not say, however, that Miss Throckmorton, "on one or two occasions" "obtruded herself upon him for a few moments." This is merely the license in deductions from the evidence which exact counsel permit themselves while "correcting" the "errors" of their adversaries.

What she says is (Rec., p. 84), that in 1886 Miss Throckmorton called and remained with Judge Holt in the parlor "*about three-quarters of an hour*" ("few moments" of adverse counsel). About a year later she called when Mrs. Washington Holt was there, and Judge Holt "on that occasion saw her in his dining-room."

This witness also says (Rec., p. 84) that Miss Throckmorton called again when Judge Holt was sick in bed, and he sent word by witness he could not see her; that Miss Throckmorton then asked the cook, Ellen Foster, to go up and say she only wished to see him for five minutes; that he then said he would see her for that length of time, and she did not remain very long. That she called again when he was not at home.

Martha Scott denied that Miss Throckmorton called on any occasion accompanied by the white servant, Anna Tulley, or by any other person whomsoever. She is squarely contradicted by the white girl, Anna Tulley (Rec., p. 88), and by Miss Throckmorton (Rec., pp. 115, 116), yet, notwithstanding the rebuke given to counsel for plaintiffs in error (Defendants' Brief, p. 18) with reference to the supposed contradiction of Devlin, counsel for defendants in error are not restrained by these contradictions of their witness, Martha Scott.

Counsel for defendants in error take exception to the statement in the brief for plaintiffs in error (Brief, p. 17) that from the time Judge Holt died, to the present, the caveators "have been in absolute control of all his papers and effects," and say (Defendants' Brief, p. 20):

> "This *reckless statement* is made without reference to any part of the Record, which is supposed to support it."

On pages 15 and 16 of the brief for plaintiffs in error it is shown, and the pages of the Record are given, that from the day of Judge Holt's death (August 1, 1894), to September 28, 1894 (a period of fifty-eight days), the caveators, Washington Holt and Sterret, were in actual possession of Judge Holt's effects, and that, during that time they burned such of his papers as they saw fit to destroy. The administrator was appointed on September 28, 1894, upon petition of the caveators herein, when none of the plaintiffs in error

were before the court and their claims of interest in the estate were unknown. The administrator thus appointed represented the next of kin and creditors, and claimed office in direct hostility to the plaintiffs in error.

It is upon this basis that counsel for the plaintiffs in error said, what (after the benefit of the correction of adverse counsel) they now deliberately repeat as established by the Record, that the defendants in error, from Judge Holt's death, have been in absolute control of his papers and effects.

The suggestion of counsel for defendants in error (Defendants' Brief, pp. 20 and 21), that under a verbal agreement between counsel for the parties, counsel for plaintiffs in error were permitted to examine the papers of Judge Holt, though certainly not in the Record, is not controverted; but it is submitted that the fact that the consent of counsel for the defendants in error was necessary and effective to give to counsel for plaintiffs in error access to the papers, demonstrates the correctness of the statement criticised, since counsel for defendants in error could give no such authority to examine the papers unless their principals, the defendants in error, were in control.

It is submitted therefore that the statement in the brief for plaintiffs in error is not a "reckless statement," but is a fair one, the truth of which is demonstrated not only by the Record but by the matter outside the Record imported into this discussion by adverse counsel in their criticism.

As stated at the outset it is not the purpose of this brief to notice all the "errors" complained of by counsel for defendants in error. It is submitted that as to the "corrections" noticed, the correctors are themselves at fault, and counsel, therefore, leave to the court the comparison of the statement of facts in their brief with the Record in the fullest confidence that no lack of fairness or accuracy will be discovered.

Counsel for defendants in error (Defendants' Brief, p. 21) criticize the statement at pages 178 and 179 of brief for plaintiffs in error that none of the letters of Judge Holt in the record contain any suggestion of a purpose to make a will in Washington Holt's favor. They quote a sentence from a letter to Mrs. Vanda Holt which they claim is marvellously like an instruction by Judge Holt to his executor. It has never been contended that Judge Holt intended to make Mrs. Vanda Holt his executrix; and, therefore, if the inference drawn from this letter be justified, it applies as much to Devlin, the executor appointed by the will in controversy, as to any other person who might have been so appointed. The letter quoted might be conceded to be a valid bequest of the piano mentioned, but in no view does it furnish evidence of a purpose to make a will in Washington Holt's favor, which is the statement criticized.

At page 22 of their brief counsel for defendants in error take exception to a statement by counsel for plaintiffs in error (Brief, p. 88) when, in speaking of the case of Hitchings *vs.* Wood, it is said that in the trial of that case, "as in the trial of the case at bar, it unexpectedly developed" that the persons most interested in the suppression of the document in contest had burnt the decedent's papers, and complain that this statement is not accompanied by any reference to the Record. At pages 17 and 82 of the brief for plaintiffs in error, in discussing the evidence on this point, it is clearly shown that this evidence was first brought out after the caveatees had closed their case, and Record pages showing this are given in each instance. Nowhere in the Record is there a suggestion that the fact appeared in evidence or was known before that time.

The straits to which counsel for defendants in error are driven in their zeal to "correct" the "errors" of adverse counsel, is well shown by their going outside of the Record

and appealing to the newspapers to support this particular criticism, for which they can find no support in the Record (Defendants' Brief, p. 22). It is submitted that counsel are not at liberty to refer to publications in the newspapers, especially as to anything not evidence in the cause, and the matter is not proper to be presented to this court. Counsel for plaintiffs in error have no knowledge as to what, if anything, was published in the daily press concerning the burning of Judge Holt's papers, but it is submitted that nothing which was so published can in anywise affect the legal consequences resulting from the unlawful burning by the defendants in error, or supply any fact not furnished by the Record.

Counsel for defendants in error (Defendants' Brief, pp. 21 and 22; see, also, pp. 37, 39) assert that one of the counsel who signs the brief in behalf of plaintiffs in error, and who participated in the trial of this cause before the jury, took no part in the preparation of that brief. This is an unauthorized assumption and one that can in no wise affect the merits of this controversy, which must be disposed of upon the record here presented without the aid of the atmosphere of the trial court. But counsel deem it proper to say that each and every of them co-operated in the production of that brief and reaffirm all it contains, notwithstanding the criticisms of adverse counsel.

Counsel for defendants in error complain (Defendants' Brief, p. 23) of the form of the assignments of errors and that they have been compelled "to grope through the numerous pages of the record," etc. The court will see that in each assignment of error the exceptions to which it relates are designated by their numbers and the pages of the record are given. To have set out the evidence and rulings at large in each of the errors assigned would have involved a reprint of the bill of exceptions—or 122 pages of the

Record. Counsel understand the plan adopted by them in this case to have met the express approval of this court.

Buckstaff *vs.* Russell, 151 U. S. 626, 636–7.
Hickory *vs.* United States, 160 U. S. 408, 413–14.

In this connection it is proper to say that the brief for plaintiffs in error was delivered to counsel for defendants in error January 22, 1900, while counsel for plaintiffs in error did not receive the brief for defendants in error until April 17, 1900, the day before the case was placed on the call for argument. During those eighty-five days no suggestion was heard from counsel that the assignments of errors were in any respect insufficient or uncertain, although there was ample time for their amendment, had such been deemed necessary or desirable.

Nevertheless, counsel remained quiescent, and proceeded with the preparation of their brief based upon those assignments of errors. It is submitted that this objection is not only ill founded, but under the circumstances not entitled to favorable consideration.

As it is not the purpose of this brief to make a reply argument, the questions of law raised and discussed in the brief for defendants in error will not be considered. It is thought proper, however, to call the attention of the court to the fact that the corrections attempted in this part of the brief for defendants in error are not more reliable than the attempted corrections of matters of fact.

Counsel for defendants in error assert that in this court plaintiffs in error have "shifted their ground" and "shrink from arguing" that any evidence to show the testator's intention after the date of the will was inadmissible, but that the burden of their complaint is that the matters to which this evidence relates occurred at an unreasonably long period after that time (Defendants' Brief, p. 26).

This is incorrect. The position of plaintiffs in error is

that Judge Holt's supposed intentions at any time are utterly immaterial, and that the admission of any evidence tending to show such intentions after the date of the will was error. Evidence of Judge Holt's conduct toward Mrs. Inglehart, in 1874, was as inadmissible as his alleged declarations to Barclay, in 1893, the remoteness in point of time only serving to emphasize the irrelevancy of the evidence and make the error more obvious (Plaintiffs' Brief, p. 176).

Counsel for defendants in error (Defendants' Brief, p. 33) say:

> "There has not been found a single case in any court in which it has been decided that on the trial of an issue of forgery in a will case it is not competent to prove the testamentary intentions of the decedent after the date of the alleged will."

This assertion is repeated in similar language at pages 41 and 42.

In three of the cases involving the issue of forgery cited by plaintiffs in error in their brief, the courts held declarations tending to show the testator's intention to be inadmissible on that issue.

In Boylan *vs.* Meeker, 4 Dutch. (N. J.), Van Dyke, J., says (p. 303):

> "The first exception taken at the trial was to the verbal declarations of the deceased . . . made at various times through a course of years . . . to prove that it had long been his *intention to make a different will, in some respects, from the one in question*, and consequently that he could never have executed this one." (See Plaintiffs' Brief, p. 128.)

The court held this evidence inadmissible.

In Johnson *vs.* Hicks, 1 Lans., the court says (p. 158):

> "Upon the trial the appellants offered to prove the declarations of Mason Hicks, before the time of

making the alleged will, that he *intended* to give his property to the legatees therein named." (See Plaintiffs' Brief, p. 137.)

The court held this evidence inadmissible.

In Swope *vs.* Donnelly, 190 Pa. St., the court says (p. 422):

"The testimony of one of the witnesses tended to show that there was a prior will; that of the other an *intention* to make a will, and perhaps that of both a *general intent* that her husband should receive only such share of her estate as the law would give him." (See Plaintiffs' Brief, p. 147.)

This testimony was held inadmissible.

At page 37 of their brief counsel for defendants in error quote Miss Throckmorton's testimony (Rec., p. 116), to the effect that Judge Holt told her that he had provided for her, and that she would be perfectly independent; and state that they understand her counsel admit this was competent, as tending to show Judge Holt's knowledge, in 1892, of the existence and contents of the will in dispute.

This is an entire misapprehension. Counsel for plaintiffs in error do not admit that this evidence was competent for any purpose. It did not tend to show a knowledge by Judge Holt of the contents or existence of the paper propounded, but simply an intention, existing in 1892, to provide for Miss Throckmorton, and was clearly inadmissible.

This declaration was not offered in chief to support the will, and the only justification for its admission was in rebuttal of similar evidence for the caveators which, under the previous ruling of the court, had been admitted against caveatee's objection.

In the brief for plaintiffs in error, in speaking of the case of Kennedy *vs.* Upshaw, 64 Texas, it is stated (Brief, p. 164) that counsel on each side in that case cite the previous decision of Johnson *vs.* Brown, 51 Texas, as authority

for both the admission and the exclusion of the testimony, and that the *court cites it* as authority for the *exclusion* of the evidence.

In the brief for defendants in error it is stated (Defendants' Brief, p. 63):

> "Johnson *vs.* Brown was cited by counsel on each side of the case, but *is not referred to in the opinion of the court.*
>
> . . . . . .
>
> "It is clear that the reason Johnson *vs.* Brown *is not referred to* in Kennedy *vs.* Upshaw, is that the two cases involve such different questions that the earlier one had no bearing upon the later decision."

A reference to page 419 of the report of Kennedy *vs.* Upshaw, 64 Texas, will show that the case of Johnson *vs.* Brown, 51 Texas, is referred to in the opinion of the court; that it is there cited precisely as stated in the brief for plaintiffs in error, and that this "correction" by counsel for defendants in error is not a correction, but a direct contradiction of the fact.

In their discussion of the question whether or no the error in admitting opinion evidence based on the style and composition of the will was cured by the subsequent instruction to disregard, counsel for the defendants in error (Defendants' Brief, pp. 76–83), refer to several authorities which have been already distinguished by the counsel for plaintiffs in error (Brief, pp. 211–212), and undertake by the citation of two New York cases to show that the rule established in that State as enunciated in Erben *vs.* Lorillard and Furst *vs.* Railroad Co. no longer prevails. The first of the cases cited by them (Detroit *vs.* Burr, 56 N. Y.) was decided four years prior to Furst *vs.* Railroad Co., and is not completely reported. The report, however, does show (p. 667) that the question to which the evidence admitted and withdrawn related was found in favor of the party complaining of its admission, who could therefore not have been injured thereby

The other case (Gall *vs.* Gall, 114 N. Y.) is analogous to Hopt *vs.* Utah in this court. A sentence of the court's opinion, *not quoted*, but immediately preceding the part quoted by counsel for the defendants in error, reads:

> "The evidence was stricken out *immediately after it was received and before it had had time to produce any permanent impression upon the minds of the jury.*"

This sentence, it is submitted, presents a very material fact, necessary to be considered in order to a correct understanding of the opinion, and should not be separated from the passage quoted by counsel for defendants in error.

Further discussing this question the brief for defendants in error states (Defendants' Brief, p. 80):

> "*All the cases cited* by adverse counsel on this point *are New York cases* prior to the case last referred to" [Gall *vs.* Gall, 114 N. Y.].

The cases of Washington Gas Light Company *vs.* Lansden, 172 U. S. 534 and Waldron *vs.* Waldron, 156 U. S. 361, cited by adverse counsel (Plaintiffs' Brief, pp. 212, 213) are certainly not New York cases.

While claiming that the subsequent exclusion of this evidence from the jury cured any error in its admission, counsel for defendants in error still insist upon its admissibility, but cite no authority in support of that contention, saying (Defendants' Brief, p. 83):

> "Authorities on the direct point can hardly be looked for."

This observation is justified so far as authority in support of the admission of the evidence is concerned, but can not be made with reference to authority for its exclusion as the case of Lee *vs.* Bennett, cited by counsel for plaintiffs in error (Brief, pp. 203–4) is precisely in point and holds the evidence to be inadmissible.

Counsel for defendants in error (Defendants' Brief, p. 95) cite the case of Bennett *vs.* Sherrod, 3 Iredell L. 303, as supporting their position that the court, in the absence of evidence on the subject, must presume the mutilation of a will to have been done by the testator, because fraud is not to be presumed, and they quote a passage from the opinion in that case.

Immediately following the passage quoted occurs this language:

> "All the rules above stated, we think, may be taken for good law; but it seems to us that they are not apposite to the case now before us. *There is no evidence in the cause that the will was found mutilated in the lifetime of the testator, or found mutilated among his papers immediately on his death.* It was on the day after his death that application was made to his widow for the will. She, who is the party defendant in this issue, acknowledged that the will or paper was there, but refused then to deliver it. She then locked the drawer where the paper was and put the key in her bosom. There is no evidence that the will was, at that time, mutilated; for her declarations then made do not prove that fact, but rather import the contrary. *On the second day after the testator's death, and after the widow had every opportunity of mutilating the paper, with which she was dissatisfied,* the will was found by the plaintiff in the drawer in its present state. *It seems to us, so far from its being the duty of the judge to charge the jury that the law presumed this mutilation to have been the act of the testator, that it would be erroneous if he had so charged.* We are of opinion that the judgment must be affirmed."

The decision of the court is thus seen to be directly adverse to the contention of counsel citing it, and strongly supports the position taken by plaintiffs in error (Brief, pp. 79–91).

Counsel for defendants in error cite (Defendants' Brief, pp.

98, 99) as authority for the guidance of this court passages from an opinion in what they style "an unreported case," that of the will of Solomon Sublette.

This "opinion" emanates from Mr. Theo. Rassieur, the judge of the Probate Court of St. Louis.

By reference to the Revised Statutes of Missouri (1889) it will be seen that the judge of the Probate Court is not required to be a lawyer, his only qualifications being that he "shall have attained the age of twenty-four years," shall have been a citizen for five years and a resident of the county for one year.

The provisions of the law are as follows:

Vol. I, Ch. 46, Art. 1, Sec. 3223 (p. 811):

> "Qualifications of Judges.—Every judge of the Supreme Court and of the St. Louis and Kansas City courts of appeals . . . shall be learned in the law. Every Judge of the Circuit Court . . . shall be learned in the law. *Every judge of probate* and of a county court *shall have attained the age of twenty-four years, and shall have been a citizen of the United States five years, and shall have been a resident of the county in which he may be elected for one year next preceding his election.*"

Ch. 46, Art. 4, Sec. 3403 (p. 837):

> "The judge of probate, *if otherwise qualified*, may practice as an attorney and counsellor at law in any of the courts of this State, except his own."

It is clear, therefore, that his opinion is wholly without weight as an authority.

In thus criticising this citation, no reflection is made upon Mr. Rassieur, who may be a lawyer of the highest ability. Nothing is known to counsel on that subject, however, and there is no reason for assuming that he possesses qualifications in excess of the requirements of law.

The facts of the case and the nature of the proceedings

not being accessible to counsel, no judgment can be formed as to the soundness of the opinion. It is submitted, however, that it is not a judicial deliverance which this court should recognize as authority or even as a precedent.

In the judgment of counsel for plaintiffs in error there are many other points of just criticism in the brief for defendants in error, which have not been noticed. It has been deemed unnecessary to do more than point out certain clear mistakes of fact and law which, it is submitted, disclose the necessity for close scrutiny of the statements of fact and propositions of law advanced on behalf of defendants in error.

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POSTSCRIPTUM.

By accident the case of Insurance Company *vs.* Hillmon, 145 U. S. 285, was omitted from the main brief filed in behalf of the plaintiffs in error. It was intended to be cited in the discussion of the subject of revocation, because, in that case, this court announces (p. 295), the proposition for which we contend, viz:

> "*When the intention to be proved is important only as qualifying an act, its connection with that act must be shown, in order to warrant the admission of declarations of the intention.*"

As no act by Judge Holt revocatory in character was

shown or attempted to be shown in evidence it follows, under the explicit ruling of this court, that no declarations of intention were admissible in proof of revocation.

The case is cited by counsel for defendants in error in their brief (Defts. Brief, pp. 39-40), but the application to this case of anything in the decision except the general proposition above cited is not perceived.

The court is at pains to show in the Hillmon case that the intention with which Walters left Wichita was in itself a distinct and material fact in a chain of circumstances which the evidence tended to prove. A distinct fact is not an independent fact any more than a distinct link in a chain is an independent link, and the court itself shows that the intention of Walters was connected with an act—another distinct fact in the chain, viz: the act of leaving Wichita.

In the case at bar it is contended by plaintiffs in error that evidence of testamentary intention unconnected with the testamentary paper, the execution of which is in issue, is inadmissible on the question of execution by reason of the restriction so plainly stated in the Hillmon case by this court. And, furthermore, that in this case it is not shown by the record, nor is it attempted to be shown in argument, that any testamentary intention of testator which the evidence of the defendants in error tends to prove, is a distinct and material fact in any chain of circumstances, or is connected with any fact material and relevant in any such chain of circumstances.

What this court says in the Hillmon case (p. 297), with reference to will cases, shows that it was not the intention of the opinion to qualify or modify the general proposition enunciated as to the absolute necessity of showing the connection of any declaration sought to be proved as qualifying an act with the particular act in question, whether such act was part of a chain of circumstances or not.

In the case at bar there is no evidence of any act by the

testator which his intentions could qualify; and there is no chain of circumstances of which his intentions could be a part; while the question whether his intention could be of itself not only a distinct and material, but an INDEPENDENT, fact to be proved on an issue of execution *vel non* is the great question in the case.

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